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No. 74-204

In the Supreme Court of the United States

OCTOBER TERM, 1975

F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, PETITIONER

v.

GEORGE H. ELDRIDGE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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We contended for the first time in our supplemental and reply brief, at pages 3-10, that the district court lacked jurisdiction to hear this case. We here reply to the contrary contention made by respondent in his supplemental brief.

1. We begin with the proposition that Section 205 (h) of the Social Security Act, 42 U.S.C. 405(h), precluded the district court from asserting jurisdiction over respondent's complaint "save as [jurisdic-

tion may have been] provided [by Section 205(g) of] the Act." *Weinberger* v. *Salfi*, No. 74-214, decided June 26, 1975, slip op., p. 6.

The second sentence of Section 205(h) provides that "[n]o findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided", *i.e.*, except as provided by Section 205(g). That sentence governs the jurisdictional issue in this case, for it is clear beyond debate that respondent's suit seeks review of a "decision" of the Secretary. The parties are in disagreement over what that "decision" is: in our view, the decision with respect to which review is sought is the Secretary's termination of respondent's disability benefits; respondent appears to claim (Resp. Supp. Br. 1-4) that the decision subject to review is the Secretary's promulgation of regulations providing for termination of benefits without a prior oral hearing. We discuss the significance of that disagreement below (pp. 4-6, *infra*). But under either party's construction of the jurisdictional facts, respondent sought review of a "decision of the Secretary" within the meaning of the second sentence of Section 205(h), and therefore the district court's jurisdiction to review that decision was subject to the limitations imposed by Section 205(g).

Respondent contends (Resp. Supp. Br. 8-11, 14-16) that Section 205(g) does not provide the exclusive jurisdictional basis for review of Social Security cases and that the district court possessed jurisdiction under the mandamus statute, 28 U.S.C. 1361,

or the Administrative Procedure Act ("APA"), 5 U.S.C. 701 *et seq.* We have already answered the substance of that contention at pages 13-18 of our brief in *Norton* v. *Mathews*, No. 74-6212, question of jurisdiction postponed to the hearing on the merits, June 30, 1975, where we showed that Section 205(h) forecloses all jurisdictional bases other than that provided by Section 205(g).[1] We rely upon that discussion here. We add only that respondent's argument with regard to the availability of mandamus or APA jurisdiction is based upon the claim that the *third* sentence of Section 205(h) does not preclude such jurisdiction,[2] whereas respondent's action (unlike the suit on behalf of the unnamed class members in *Norton*, which apparently was brought before those members had even presented their claims to the Secretary) seeks review of a "decision of the Secretary" and therefore is governed as well by the *second* sentence of Section 205(h), which explicitly precludes such review except as provided by Section 205(g). Accordingly, no matter how the claim of mandamus or APA jurisdiction is resolved in *Norton*, jurisdiction here exists, if at all, only under Section 205(g).

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[1] A copy of our brief in *Norton* is being furnished to respondent's counsel.

[2] The third sentence of Section 205(h) provides:

> No action against the United States, the Secretary, or any officer or employee thereof shall be brought under [Section 1331 *et seq.*] of Title 28 to recover on any claim arising under [Title II of the Social Security Act].

Respondent's action, which seeks reinstatement of disability insurance benefits allegedly due him under Title II of the Act, is subject to the limitations imposed by that sentence.

2. Respondent's suit did not meet the jurisdictional requirements of Section 205(g). That provision grants the federal district courts jurisdiction to review "any final decision of the Secretary made after a hearing to which [the plaintiff] was a party," upon commencement by the plaintiff of "a civil action * * * within sixty days after the mailing to him of notice of such decision * * *." In this case there was no "final decision of the Secretary." As we explained at pages 5-8 of our supplemental and reply brief, the Secretary's order terminating respondent's disability benefits was subject to administrative review, which respondent did not seek.[3] Accordingly, it was not subject to judicial review under Section 205(g).

Respondent's contrary argument (Resp. Supp. Br. 1-6) appears to be that the "final decision of the Secretary" subject to review in this case is the Secretary's promulgation of regulations providing for the termination of disability benefits without a prior oral hearing, that that decision has been acknowledged by the Secretary to be "final," and that a decision so acknowledged to be final is subject to review under Section 205(g) whether or not "made after a hearing." That syllogism falls with its major premise. The decision of the Secretary sought to be reviewed here is not his promulgation of regulations but rather the specific termination of respondent's own disability benefits. This is made plain by respondent's complaint. The relief respondent seeks is not a declaration of the invalidity of the Secretary's regulation, or an injunction restraining its enforcement, but rather that the Secretary's decision terminating respondent's disability benefits be vacated and the Secretary "commanded to immediately transmit unto * * * [respondent] * * * the disability benefits checks for the month of August, 1972 and all subsequent months thereafter until * * * [respondent] is afforded a hearing" (A. 3).

Moreover, the Secretary's procedural regulations would not have been subjected to pre-exhaustion judicial review even if respondent had requested broad declaratory or injunctive relief. Section 205(g) provides for review of the validity of the Secretary's regulations only in connection with review of the propriety of final actions taken by the Secretary with respect to a particular claimant or claimants. Respondent's contrary argument—that the district courts possess Section 205(g) jurisdiction over suits challenging the validity of the Secretary's regulations, on the theory that the regulations represent "final decision[s] of the Secretary," whether or not the

[3] At oral argument in this case on October 6, 1975, respondent's counsel stated that respondent had sought administrative reconsideration of the Secretary's order terminating payment of benefits. We are informed by the Social Security Administration that respondent made no such request. We are further informed, however, that on February 5, 1973, after expiration of time for filing a request for reconsideration, respondent filed a new application for benefits, which has not been acted upon, apparently because of the pendency of this litigation and the district court's unstayed order that respondent's benefit payments be continued.

plaintiffs' administrative claims had been subject to a final administrative decision or, indeed, any decision at all—is at cross-purposes with both the statutory language and the evident legislative intent. As we demonstrated in our brief in *Norton*, Congress intended to provide, and has provided, only for case-by-case review of individual claims, after the individual has exhausted his administrative remedies. The legislative intent is manifested, *inter alia*, by Section 205(g)'s requirements that the "final decision" sought to be reviewed have been made "after a hearing to which [the plaintiff] was a party" and that the suit be brought "within sixty days after the mailing to [the plaintiff] of notice of such decision * * *." Those requirements can be met only by a claimant who seeks review of a decision denying a specific claim for benefits. They could not be met by an individual seeking review of the Secretary's decision to promulgate regulations, for the individual would not be a "party" to a hearing on proposed regulations, nor would he be mailed a notice of the Secretary's decision to promulgate the proposed regulations. In short, in enacting Section 205(g), Congress quite clearly was concerned only with establishing an orderly means of securing post-exhaustion judicial review of individual claims, not with establishing a mechanism for premature and possibly unnecessary judicial review of the constitutional adequacy of the Secretary's procedures where, as here, subsequent administrative review might have remedied the alleged injury by resulting in the award of back benefits for the period affected by the termination order.

3. Application here of the strict jurisdictional requirements of Section 205(g) need not operate to foreclose later judicial consideration of the constitutional issue respondent seeks to litigate. Respondent's repeated assertions to the contrary (Resp. Supp. Br. 7, 11-14) overlook the fact that, as we explained at pages 8-10 of our supplemental and reply brief, a district court would have ample power to adjudicate that issue upon post-exhaustion review of a final decision by the Secretary.[4]

It is therefore respectfully submitted that the judgment of the court of appeals should be vacated and the case remanded with instructions to dismiss.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1975.

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[4] Respondent appears to argue (Resp. Supp. Br. 3-4, n. 3) that pre-exhaustion review would be preferable as a "[j]urisprudential" matter. That argument is based upon the factual misconception that adjudication upon post-exhaustion review would involve "a prospective, declaratory judgment case, rather than * * * a situation in which the asserted injury has already occurred" (*ibid.*). Post-exhaustion review in fact would necessarily involve "a situation in which the asserted injury has already occurred." But respondent's argument is also jurisprudentially misconceived, for the underlying jurisprudential concern here—that of avoiding premature and possibly unnecessary adjudication of difficult constitutional questions—in fact strongly militates against granting the pre-exhaustion review respondent seeks. But, at bottom, the decision on the jurisdictional issue in this case should turn not upon asserted jurisprudential concerns but upon the language of the jurisdictional statute and Congress' intent in enacting it, which, as we have shown, preclude the premature review respondent seeks.

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